SUBMITTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 60

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER,

vs.

J. H. DRUMMOND

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 30, 1928

CERTIORARI GRANTED JUNE 4, 1928

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(31,889)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 360

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER,

vs.

J. H. DRUMMOND

N WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

PETITION—Filed May 12, 1924

Count 1

(1)

J. H. Drummond, the plaintiff herein, is a resident and citizen of the State of Florida.

(2)

Ben W. Steele, is the duly acting and qualified executor of the Estate of A. B. Steele, deceased, and is a resident and citizen of the State of Georgia, within the Northern District, Northern Division of the United States District Court. The said Ben W. Steele, in his capacity as executor of the Estate of A. B. Steele, deceased, is the defendant herein.

(3)

The amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars, ($3,000.00).

(4)

The jurisdiction of this Court is invoked on the ground of diversity of citizenship, said plaintiff being a resident [fol. 2] and citizen of the State of Florida, and the defendant being a resident and citizen of the State of Georgia.

(5)

Prior to June 6th, 1914, said A. B. Steele was a stockholder in what is known as the Atlanta & St. Andrews Bay Railway Company, a corporation which operated as a common carrier a line of railroad with passenger and freight service from Panama City, Florida, to Dothan, Alabama.

Said Steele was also interested in the Enterprise Lumber Company, and said Lumber Company was also a large stockholder in said Railroad Company.

(6)

Prior to June 6th, 1914, plaintiff owned a large area of land, together with valuable water rights to the frontage on St. Andrews Bay, within the City limits of St. Andrews, Florida, an incorporated town, which was adjacent to Panama City, Florida. In fact, the East line of Panama City, Florida, was the west line of St. Andrews, Florida.

Panama City, Florida, and St. Andrews, Florida, in 1914, were rival towns. The resources of each town and the adjacent territory, consisted very largely of timber lands and excellent fisheries, were largely undeveloped. The citizens of each town were anxious to obtain for that town superior railroad or transportation facilities in order to attract settlers and to offer the settlers greater advantages than the other.

(7)

The said A. B. Steele was desirous of extending that Atlanta & St. Andrews Bay Railway Company from Pan- [fol. 3] ama City, Florida, to St. Andrews Bay Harbor so as to enable said railroad to handle the traffic originating at St. Andrews Bay Harbor and to attract inland, coastwise trade at St. Andrews Bay Harbor.

From time to time prior to June 6th, 1914, the question of making the proposed extension was discussed between said A. B. Steele and the plaintiff herein. The plaintiff herein made known to said Steele the fact that he was a large land owner in and around St. Andrews, Florida, and that for this reason was greatly interested in having the proposed extension built and signified his desire to co-operate with said Steele in having said railroad built. Plaintiff's purpose in encouraging said enterprise was to enhance his land and other holdings in and around St. Andrews, Florida, by furnishing said town railroad facilities, at least equal to the railroad facilities at Panama City, Florida, and fully acquainted said Steele with the interest he held, the land he owned in said town and the benefits that would inure to him if said proposed extension was actually built.

(8)

Prior to June 6th, plaintiff signified to said Steele his willingness to obtain a right of way through and over the town of St. Andrews, Florida, and the terminal rights in and to St. Andrews Bay Harbor, to do all the necessary grading and construction of said road, to furnish the necessary cross-ties, and to do each and everything necessary to the construction and completion of said road at plaintiff's own expense, except the furnishing of the rails, bolts and spikes, provided Steele would give some assurance that St. Andrews, Florida, would have permanent railroad ac- [fol. 4] commodations, both passenger and freight, equal in all respect to the service that was then, or that thereafter might be, given Panama City, Florida.

The desire of said plaintiff as expressed to said Steele was to put St. Andrews, Florida, on an equality with Panama City, Florida, so that the former City would be at no disadvantage from the standpoint of transportation facilities.

(9)

On June 6th, 1914, said A. B. Steele and the plaintiff herein entered into a tentative contract fixing the terms between them upon which said proposed extension should be constructed. Said contract was conditioned, however, upon the parties thereto being able to determine within a time specified whether the necessary right of way for the construction of said railroad could be obtained, a copy of said contract is hereto attached, marked Exhibit "A".

(10)

Said conditional contract of June 6th, 1914, thereafter became finally binding, as evidenced by contract and agreement of July 9th, 1914, a copy of which is hereto attached, marked Exhibit "B".

(11)

Under said contracts said A. B. Steele covenanted and agreed:

(a) To secure a charter for a company to be organized as a common carrier;

(b) To convey to that company that part of the right of way within the limits of Panama City, Florida;

[fol. 5] (c) To furnish for the construction of said railroad all rails, spikes, bolts, plates, switches and all iron and steel material, and to deliver the same upon the ground;

(d) To deliver to the road bed the cross-ties furnished by said Drummond;

(e) "To procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Alabama, to St. Andrews, Florida, giving to St. Andrews, Florida, the same service at all times as shall be given by said Atlanta & St. Andrews Bay Railway Company to Panama City, both regular and excursion trains with equally good rates (as far as permitted by the public authorities) for the carriage of both passengers and freight."

(12)

Said Drummond, the plaintiff herein agreed:

(a) To obtain and convey to said Company a right of way within the City of St. Andrews, Florida;

(b) To pay all costs and damage in obtaining possession of said right of way passing over privately owned lands, and to procure necessary franchises and ordinances from the town of St. Andrews, Florida, and to pay for the exercising of said franchises;

(c) That if any land could not be obtained by agreement, the same was to be condemned by the proposed Railroad Company, said Drummond agreeing to stand the expense thereof;

[fol. 6] (d) To bear the expense of clearing and grading the whole of said land from Atlanta & St. Andrews Bay Railway to the waters of said St. Andrews Bay, approximately a distance of 3 miles;

(e) To furnish all ties and lay the same and build all necessary trestles and culverts;

(f) To build a "Y" of about ¾ of a mile.

(g) To convey, or cause to be conveyed, to the proposed railroad company water terminals fronting 400 feet on St. Andrews Bay and running back about 50 feet to a street.

(13)

Said Steele did procure for said company a charter and organized under the name of the St. Andrews Bay Railway & Terminal Company with a capital stock of Fifty Thousand Dollars, ($50,000.00), all, or practically all of which was subscribed for and owned by said the said A. B. Steele.

(14)

Plaintiff fully performed his part of said contract, he built and constructed said railroad, obtained the necessary right of way, ordinances and franchises from the City of St. Andrews, Florida.

(15)

Article four (4) of said Charter provided: "The term for which this corporation shall exist shall be perpetual."

[fol. 7]

(16)

At the instance and request of the said A. B. Steele, the plaintiff herein, conveyed by deed dated the 15th, day of October, 1915, said completed railroad to said St. Andrews Bay Railway & Terminal Company, as provided in said contract, and recognition of the full performance of all of the obligations resting on him the following stipulation was inserted in said deed of conveyance from plaintiff to said Railway Company, to-wit:

"It is understood by and between the parties hereto that in compliance with agreements entered into by the said J. H. Drummond and A. B. Steele on June 6th, 1914, and July 9th, 1914, that the said parties have secured the right of way for said road as agreed upon therein and that said J. H. Drummond has cleared, graded, laid the ties and surfaced the entire line of railroad, above mentioned. * * * It is also understood that the said J. H. Drummond has built all trestles and culverts, and has built at the end near the St. Andrews Ice & Power plant, in the town of St.

Andrews, Florida, a 'Y,' which is to remain his property. * * * The acceptance of this conveyance, lease and agreement by the party of the second part, or the recording of same, shall be conclusive evidence that said J. H. Drummond, party of the first part, has fully carried out and performed his agreement, herein above mentioned; with said A. B. Steele and has done so as modified or changed by subsequent agreements, either verbally or written, relating to said contract, and that said agreements have been fully and completely carried out and performed by him in a manner satisfactory to the party of the second part, including [fol. 8] the construction of a depot and all other matters therein, and thereby agreed to be done or performed by him; the party of the second part being the corporation organized by said A. B. Steele, as provided by said contracts."

(17)

Plaintiff actually expended in the construction of said Railroad and in the performance of the terms of said contract the sum of $53,178.11.

(18)

Said A. B. Steele recognizing the obligations upon him in said contract began the operation of trains through said Atlanta & St. Andrews Bay Railway & Terminal Company in and to St. Andrews, Florida, procuring for the said City the same service as was given by the Atlanta & St. Andrews Bay Railway Company to Panama City, Florida, for the carriage of both passengers and freight.

The performance of said contract on the part of said A. B. Steele continued until on or about August 1921, at which time the operation of trains for both passenger and freight service stopped and since that time St. Andrews, Florida, has not been furnished any railroad service, or accommodations whatsoever, either passenger or freight.

(19)

At all times since the making of said contracts, June 6th, 1914, and July 9th, 1914, Panama City has had, and continues to have, regular and adequate passenger and freight

service furnished it by the Atlanta & St. Andrews Bay Rail-
[fol. 9] way Company, which service is now in full force and effect.

(20)

The moving consideration of said plaintiff in making the large expenditure in the construction of said railroad was the covenant on the part of said A. B. Steele "to procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Alabama, to St. Andrews, Florida, giving to St. Andrews, Florida, the same service at all times as shall be given by the said Atlanta & St. Andrews Bay Railway Company to Panama City * * * for the carriage of both passengers and freight."

Except for the covenant on the part of said Steele to procure permanently said equality of service, plaintiff would not have entered into said contract and incurred said large expenditure, and this fact was fully known and understood by said Steele, who covenanted and agreed to procure said service in order to induce your plaintiff to make said large monetary outlay.

(21)

The failure on the part of said A. B. Steele, and the defendants herein, to procure the continuous operation of said railroad service constitutes a breach of said contracts, for which they are liable to your plaintiff in damages. Plaintiff shows that on account of the breach of said contracts on the part of said A. B. Steele, and the defendants herein, [fol. 10] that the expenditure of said $53,178.11, by plaintiff has become, and now is, a total loss to him and said defendants herein is duty bound to reimburse plaintiff in said sum of $53,178.11, together with interest at the rate of 7 per cent, per annum from August 1921.

Wherefore plaintiff prays judgment against said defendant in the full sum of $53,178.11, plus interest at the rate of 7 per cent, per annum from August 1921; and

Wherefore, plaintiff prays further that process may issue requiring said defendant to be and appear at the next term

of this Honorable Court, which convenes on the first Monday in October, 1924, to answer this complaint.

Spaulding, MacDougald & Sibley, Attorneys for Plaintiff.

Count II

(1)

J. H. Drummond, the plaintiff herein, is a resident and citizen of State of Florida.

(2)

Ben W. Steele, is the duly acting and qualified executor of the Estate of A. B. Steele, deceased, and is a resident and [fol. 11] citizen of the State of Georgia, within the Northern District, Northern Division of the United States District Court. The said Ben W. Steele, in his capacity as executor of the Estate of A. B. Steele, deceased, is the defendant herein.

(3)

The amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00).

(4)

The jurisdiction of this Court is invoked on the ground of diversity of citizenship, said plaintiff being a resident and citizen of the State of Florida, and the defendant being a resident and citizen of the State of Georgia.

(5)

Prior to June 6th, 1914 said A. B. Steele was a stockholder, in what is known as the Atlanta & St. Andrews Bay Railway Company, a corporation which operated as a common carrier a line of railroad with passenger and freight service from Panama City, Florida, to Dothan, Alabama. Said Steele was also interested in the Enterprise Lumber Company, and said Lumber Company was also a large stockholder in said Railroad Company.

(6)

Prior to June 6th, 1914, plaintiff owned a large area of land, together with valuable water rights to the frontage on St. Andrews Bay, within the City limits of St. Andrews, [fol. 12] Florida, an incorporated town, which was adjacent to Panama City, Florida. In fact, the East line of Panama City, Florida, was the West line of St. Andrews, Florida. Panama City, Florida, and St. Andrews, Florida, in 1914, were rival towns. The resources of each town and the adjacent territory, consisting very largely of timber land and excellent fisheries, were largely undeveloped. The citizens of each town were anxious to obtain for that town superior railroad or transportation facilities in order to attract settlers and to offer the settlers greater advantages than the other.

(7)

The said A. B. Steele was desirous of extending that Atlanta & St. Andrews Bay Railway Company from Panama City, Florida, to St. Andrews Bay Harbor so as to enable said railroad to handle the traffic originating at St. Andrews Bay Harbor and to attract inland, coast-wise trade at St. Andrews Bay Harbor.

From time to time prior to June 6th, 1914, the question of making the proposed extension was discussed between said A. B. Steele and the plaintiff herein. The plaintiff herein made known to said Steele the fact that he was a large land owner in and around St. Andrews, Florida, and that for this reason was greatly interested in having the proposed extension built and signified his desire to co-operate with said Steele in having said railroad built. Plaintiff's purpose in encouraging said enterprise was to enhance his land and other holdings in and around St. Andrews, Florida, by furnishing said town railroad facilities, at least equal to the railroad facilities at Panama City, Florida, and fully acquainted said Steele with the interest he held, the land he owned in said town and the benefits that [fol. 13] would inure to him if said proposed extension was actually built.

(8)

Prior to June 6th, 1914, plaintiff signified to said Steele his willingness to obtain a right of way through and over the town of St. Andrews, Florida, and the terminal rights in and to St. Andrews Bay Harbor, to do all the necessary grading and construction of said road, to furnish the necessary cross-ties, and to do each and everything necessary to the construction and completion of said road at plaintiff's own expense, except the furnishing of the rails, bolts and spikes, provided Steele would give some assurance that St. Andrews, Florida, would have permanent railroad accommodations, both passenger and freight, equal in all respects to the service that was then, or that thereafter might be, given Panama City, Florida.

The desire of said plaintiff as expressed to said Steele was to put St. Andrews, Florida, on an equality with Panama City, Florida, so that the former City would be at no disadvantage from the standpoint of transportation facilities.

(9)

On June 6th, 1914, said A. B. Steele and the plaintiff herein entered into a tentative contract fixing the terms between them upon which said proposed extension should be constructed. Said contract was conditioned, however, upon the parties thereto being able to determine within a time specified whether the necessary right of way for the [fol. 14] construction of said railroad could be obtained, a copy of said contract is hereto attached, marked Exhibit "A".

(10)

Said conditional contract of June 6th, 1914, thereafter became finally binding, as evidenced by contract and agreement of July 9th, 1914, a copy of which is hereto attached, marked Exhibit "B".

(11)

Under said contracts said A. B. Steele covenanted and agreed:

(a) To secure a charter for a company to be organized as a common carrier;

(b) To convey to that Company that part of the right of way within the limits of Panama City, Florida.

(c) To furnish for the construction of said railroad all rails, spikes, bolts, plates, switches and all iron and steel material, and to deliver the same upon the ground;

(d) To deliver to the road bed the cross-ties furnished by said Drummond;

(e) "To procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Alabama, to St. Andrews, Florida, giving to St. Andrews, Florida, the same service at all times as shall be given by said Atlanta & St. Andrews Bay Railway Com- [fol. 15] pany to Panama City, both regular and excursion trains with equally good rates (as far as permitted by the public authorities) for the carriage of both passengers and freight."

(12)

Said Drummond, the plaintiff herein agreed:

(a) To obtain and convey to said Company a right of way within the City of St. Andrews, Florida:

(b) To pay all costs and damage in obtaining possession of said right of way passing over privately owned lands, and to procure necessary franchises and ordinances from the town of St. Andrews, Florida, and to pay for the exercising of said franchises;

(c) That if any land could not be obtained by agreement, the same was to be condemned by the proposed Railroad Company, said Drummond agreeing to stand the expense thereof;

(d) To bear the expense of clearing and grading the whole of said land from Atlanta & St. Andrews Bay Railway to the waters of said St. Andrews Bay, approximately a distance of 3 miles;

(e) To furnish all ties and lay the same and build all necessary trestles and culverts;

(f) To build a "Y" of about ¾ of a mile.

(g) To convey, or cause to be conveyed, to the proposed railroad company water terminals fronting 400 feet on [fol. 16] St. Andrews Bay and running back about 50 feet to a street.

(13)

Said Steele did procure for said company a charter and organized under the name of the St. Andrews Bay Railway & Terminal Company with a capital stock of Fifty Thousand Dollars, ($50,000.00), all, or practically all of which was subscribed for and owned by the said A. B. Steele.

(14)

Article four (4) of said charter provided; "The term for which this corporation shall exist shall be perpetual."

(15)

Plaintiff fully performed his part of said contract, he built and constructed said railroad, obtained the necessary right of way, ordinances and franchises from the City of St. Andrews, Florida.

(16)

At the instance and request of the said A. B. Steele, the plaintiff herein, conveyed by deed dated the 15 day of October, 1915, said completed railroad to said St. Andrews Bay Railroad & Terminal Company, as provided in said contract, and in recognition of the full performance of all of the obligations resting on him the following stipulation was inserted in said deed of conveyance from plaintiff to said Railway Company, to-wit:

"It is understood by and between the parties hereto that in compliance with agreements entered into by the said [fol. 17] J. H. Drummond and A. B. Steele on June 6th, 1914, and July 9th, 1914, that the said parties have secured the right of way for said road as agreed upon therein and

that said J. H. Drummond has cleared, graded, laid the ties and surfaced the entire line of railroad, above mentioned. * * * It is also understood that the said J. H. Drummond has built all trestles and culverts, and has built at the end near the St. Andrews Ice & Power Plant, in the town of St. Andrews, Florida, a "Y," which is to remain his property. * * * The acceptance of this conveyance, lease and agreement by the party of the second part, or the recording of same, shall be conclusive evidence that said J. H. Drummond, party of the second part, has fully carried out and performed his agreement, therein above mentioned; with said A. B. Steele and has done so as modified or changed by subsequent agreements, either verbally or written, relating to said contract, and that said agreements have been fully and completely carried out and performed by *by* him in a manner satisfactory to the party of the second part, including the construction of a depot and all other matters therein, and thereby agreed to be done or performed by him; the party of the second part being the corporation organized by said A. B. Steele, as provided by said contracts."

(17)

Plaintiff actually expended in the construction of said Railroad and in the performance of the terms of said contract the sum of $53,178.11.

(18)

Said A. B. Steele recognizing the obligations upon him in said contract began the operation of trains through the said [fol. 18] Atlanta & St. Andrews Bay Railway & Terminal Company in and to St. Andrews, Florida, procuring for the said City the same service as was given by the Atlanta & St. Andrews Bay Railway Company to Panama City, Florida, for the carriage of both passengers and freight.

The performance of said contract on the part of said A. B. Steele continued until on or about August, 1921, at which time the operation of trains for both passengers and freight service stopped and since that time St. Andrews, Florida, has not been furnished any railroad service, or accommodations whatsoever, either passenger or freight.

(19)

At all times since the making of said contracts, June 6th, 1914, and July 9th, 1914, Panama City has had, and continues to have, regular and adequate passenger and freight service furnished it by the Atlanta & St. Andrews Bay Railway Company, which service is now in full force and effect.

(20)

The moving consideration of said plaintiff in making the large expenditure in the construction of said railroad was the covenant on the part of said A. B. Steele "to procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Alabama, to St. Andrews, Florida, giving to St. Andrews, Florida, the same service at all times as shall be given by the said Atlanta [fol. 19] & St. Andrews Bay Railway Company to Panama City * * * for the carriage of both passengers and freight."

Except for the covenant on the part of said Steele to procure permanently said equality of service, plaintiff would not have entered into said contract and incurred said large expenditure, and this fact was fully known and understood by said Steele, who covenanted and agreed to procure said service in order to induce your plaintiff to make said large monetary outlay.

(21)

The failure on the part of said A. B. Steele, and the defendant herein, to procure continuous operation of said railroad service constituted a breach of said contracts for which he is liable to your plaintiff in damages.

(22)

That at the time of the negotiations for the construction of said railroad were entered into and at the time said contracts were executed, plaintiff owned in St. Andrews, Florida, and now owns the following real estate;

Undivided ½ interest in about 600 acres of land with H. J. Bruton & Miller Brothers.

165 Acres in Sections, 25, 26 & E. ½ of N. W. ¼ of 35 T. 3 S. R. 15 W.

⅓ interest in 145 acres in Drummond & Ware addition N. E. ¼ Sec. 35.

Interest in lots (about 65 acres) in S. ½ Sec. 35 T. 3 S. R. 15 W.

[fol. 20] Lots & Blks. in S. W. ¼ Sec. 36 T. 3 S. R. 15 W. (including all of my interests).

All interest in lots in S. E. ¼ of Sec. 36 T. 3 S. R. 15 W.

All interest in Lots & Blocks in N. E. ¼ of Sec. 1 T. 4 S. R. 15 W.

All interest in lands and lots in N. W. ¼ of Sec. 1 T. 4 S. R. 15 W.

All interest in lots of S. ½ of Sec. 1 T. 4 S. R. 15 W. Except Ice plant etc.

All interest in West Half of Section 6 T. 4 S. 14 W.

All interest in S. E. ¼ of Sec. 6 T. 4 S. R. 14 W.

(23)

That said real estate in August 1921, and shortly prior thereto, was reasonably worth some $269,725.00; that on account of the breach of the contracts on the part of said A. B. Steele, and the defendant herein, the value of said real estate has depreciated, at least 25 per cent, and plaintiff has been damaged in the sum of $67,431.25, on account of the depreciated value of said real-estate by virtue of the breach of said contracts by A. B. Steele, and the defendant herein.

(24)

Plaintiff also owned at the time said railroad was constructed, and now owns, the following businesses:

[fol. 21] All interest in electric light plant & equipment in city of St. Andrews, Fla.; all interest in Ware Mercantile Co.; store business, St. Andrews, the physical value of which in August 1921, and prior thereto was $40,000.00, and the value of said businesses have depreciated at least 25 per cent, on account of the failure of said A. B. Steele, and the defendant herein, to carry out the terms of said con-

tracts, and plaintiff's loss and damage therefrom is $10,000.00.

(25)

That the total loss and damage suffered by your plaintiff on account of the breach of said contracts by said A. B. Steele, and the defendant herein, is the sum of $77,431.25.

Wherefore, plaintiff prays judgment against said defendant in the full sum of $77,431.25, plus interest at the rate of 7 per cent, per annum from August 1921; and

Wherefore plaintiff prays further that process may issue requiring said defendants to be and appear at the next term of this Honorable Court, which convenes on the first Monday in October, 1924, to answer this complaint.

Spalding, MacDougald & Sibley, Attorneys for Plaintiff.

[fol. 22] EXHIBIT "A" TO PETITION

This agreement, entered into this the 6th day of June, 1914, by and between A. B. Steele and J. H. Drummond, witnesseth:

The said parties desire to enter into the agreement hereinafter set forth for the construction and maintenance of a line of railway from the Atlanta & St. Andrews Bay Railway in Panama City to the town of St. Andrews, the right of way for which is to be provided for by the said parties, the said A. B. Steele (within ten days shall take steps to procure) at his own expense for the said proposed railway, a right of way over that part of its line, lying within Panama City, and the said J. H. Drummond shall within said time take steps, at his own expense to secure the right of way for said proposed road lying within St. Andrews, Fla., and if at the expiration of said time they are mutually satisfied of their ability to procure said right of way and to carry out the said proposed agreement, they shall then enter into a contract therefor as hereinafter provided.

The said A. B. Steele shall procure from the State of Florida a charter for the construction and maintenance of said line by a Company to be organized as a common carrier

or passengers and freight, and shall convey to the said Company that part of the right of way for said proposed line lying within the limits of Panama City as aforesaid. And the said J. H. Drummond shall convey or cause to be conveyed to the said Company the right of way for that part of said line lying within the limits of St. Andrews; said right of way to be procured and conveyed as aforesaid shall run from a point on the Atlanta & St. Andrews Bay Railway within two hundred feet of the intersection of said west line with the proposed route for said line of railway as heretofore surveyed by E. L. Wood and profiled. The line [fol. 23] of said road in St. Andrews shall pass just north of the Ice Plant now erected in said town and going on to the water just north of the bakery south of St. Andrews Post Office; the said road to be completed as far as the Ice Plant without delay and to be completed to the water within fifteen months from the date of signing of said contract.

In procuring the aforesaid rights of way within the town of St. Andrews, the said J. H. Drummond shall pay or cause to be paid without expense to said railway, all costs and damage in obtaining possession of same over privately owned lands and shall where said right of way passes over public streets of said town, procure the necessary ordinance or ordinances from said town granting a franchise for said railway; and the said A. B. Steele shall cause the said railway company when incorporated to condemn any part or parts of such right of way which cannot be procured by private agreement at reasonable cost; the cost of such condemnation within the limits of St. Andrews to be borne by the said J. H. Drummond, including the values of the land so condemned; the right of way, in so far as it runs over private property to be thirty feet in width. The said J. H. Drummond shall bear the expense of clearing and grading the whole of said line from said Atlanta & St. Andrews Bay Railway road to the waters of said bay and shall furnish all ties and lay the same and build all trestles and culverts necessary for the said line, and shall lay the rails and do the surfacing of the road bed of said line of road; the grade shall not be over one and a half per cent at any point.

The said J. H. Drummond will also convey or procure to be conveyed to the said railway company for water ter-

minals land fronting four hundred feet on the waters of St. Andrews Bay and running back about fifty feet to a street, with all riparian rights thereunto belonging said land lying a little north of the said bakery.

[fol. 24] The said A. B. Steele shall furnish or procure to be furnished to the construction of the said road, the rail, spikes and bolts, plates, switches and all iron and steel material therefor and shall deliver the same on the ground, and shall also deliver on the ground the ties to be furnished by the said J. H. Drummond, if they are brought in by rail and purchased along the line of said Atlanta & St. Andrews Bay Railway, and if agreed to do so shall procure the said road to haul all earth used for fills in grading said proposed line at the actual cost of such handling.

The said A. B. Steele further agrees to procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Ala., to St. Andrews, Fla., giving to St. Andrews, Fla., the same service at all times, as shall be given by the said Atlanta & St. Andrews Bay Railway Company to Panama City for both regular and excursion trains, with equally good rates (as far as permitted by the public authorities) for the carriage of both passengers and freight.

The said J. H. Drummond further agrees to construct at his own expense a "Y" at the ice plant owned by the St. Andrews Ice & Power Company and to allow the said railway company to use the same under a lease for a period of three years at a rental of one dollar per year, with the provision that in the event any other line of railway shall be built into St. Andrews such other road or roads may under arrangements with the said J. H. Drummond make reasonable use of said "Y"; provided further that the St. Andrews Ice & Power Company shall have the privilege of using the said "Y" when it can be done safely without unreasonably interferring with the operations of the said proposed road. The parties using said "Y" shall share [fol. 25] the expense of the cost of maintenance thereof in proportion to their use of same.

The said J. H. Drummond shall also build or cause to be built at an expense of $500, the depot for said railroad at a

point near St. Andrews Bay near the west end of said road or in the event that the said railway company shall decide to build a more expensive depot they may do so at their election and in that event the said J. H. Drummond shall contribute 500, towards the cost thereof. The said J. H. Drummond will also give a right of way for such depot and terminal facilities one hundred and thirty two feet wide across block thirty one and across the west half of block thirty two in the northwest quarter of section one in township four South of range fifteen west.

The conveyance of the said right of way made or procured by the said J. H. Drummond shall be conditioned upon the continued maintenance and operation of the said line of road, giving the service as above provided and that upon failure to furnish the same for a period of thirty days, said property shall revert to the grantor or grantors. Provided that should such service be prevented by strikes, violence or unavoidable outside agency, said thirty days shall not begin to run until after the said cause has ceased to exist.

The construction of the said road-bed and track shall be commenced within thirty days from the procurement of the said right of way for said road and shall be pushed forward to completion as speedily as possible.

Witness our hands this the 6th day of June, 1914.

(Signed) A. B. Steele, J. H. Drummond.

[fol. 26] EXHIBIT B TO PETITION

This contract, made in duplicate and entered into this the 9th day of July, A. D. 1914, by and between A. B. Steele, of Atlanta, Georgia, and J. H. Drummond, of St. Andrews, Florida, witnesseth:

That whereas, the said A. B. Steele and J. H. Drummond on the 6th day of June, A. D. 1914, entered into the agreement hereto attached and hereby made a part of this contract and whereas both A. B. Steele and J. H. Drummond were at the expiration of the ten days from date of said agreement mutually satisfied of their ability to procure said right of way and to carry out the said proposed agreement. Now, therefore, the said A. B. Steele and J. H.

Drummond in consideration of the promises made and the benefits to be derived therefrom and from the construction and operation of said proposed railroad for their mutual benefit hereby enter into and agree to be bound by the terms of said contract as proposed in said agreement.

It is further agreed between the said parties hereto that the line of railroad will be built to the bay shore in Block thirty one, N. W. ¼ of Sec-. 1 to 4, S. 15 W. in St. Andrews and that the depot will be located on said block.

That the said J. H. Drummond will furnish for terminals the following property, four hundred feet of water front with riparian right on St. Andrews Bay in front of block thirty one and lots seventeen, sixteen, two, three and four in block thirty one and lots sixteen, seventeen, two and three in block thirty two, all in the N. W. ¼ of Sec-. 0 to 4. S. 15 W.

[fol. 27] It is further agreed to by said parties hereto that a profile and alignment map of the said line of railroad as agreed upon by and between J. H. Drummond and B. W. Steele, shall be attached to this contract and be made a part thereof and shall be exhibit "A."

That a map of all the property and right of way and showing the said line of railroad, as agreed on by and between J. H. Drummond and B. W. Steele shall be attached to this contract and shall be a part thereof and shall be exhibit "B."

It is further agreed by the said parties, A. B. Steele and J. H. Drummond that as the above mentioned profile and alignment map, and the map of property and right of way, marked respectively exhibit "A" and "B" have not been fully completed at the time of signing of this contract that these exhibits as above described when completed shall be attached to this contract and be made a part thereof and that each of said exhibits shall bear the signatures of J. H. Drummond and A. A. Holmes for identification.

The said J. H. Drummond agrees to begin work on this above described railroad within thirty days from date hereof and agrees to have the railroad completed to the Ice Plant in St. Andrews within ninety days from date of beginning provided the said J. H. Drummond is not prevented by violence or unavoidable outside agency.

Witness our hands this the 9th day of July, A. D. 1914.

(Signed) A. B. Steele, J. H. Drummond.

[fol. 28] IN UNITED STATES DISTRICT COURT

NOTE RE SUMMONS AND MARSHAL'S RETURN

Summons and Marshal's Return omitted from the printed record.

IN UNITED STATES DISTRICT COURT

AMENDMENT TO PETITION AND ORDER FILING SAME—Filed April 25, 1925

Count 1

Now comes the plaintiff and amends Count 1 of his petition, after leave of the Court first obtained, and for grounds of amendment says:

(1)

Plaintiff amends paragraph 2 of Count 1 by adding thereto the following allegation at the conclusion of said paragraph, to-wit:

That said A. B. Steele died on December 17th, 1916.

(2)

Plaintiff amends paragraph 16 by adding thereto the following allegation:

Said deed is hereto attached, marked Exhibit C, and is made a part of this petition.

Wherefore plaintiff prays that this his amendment be allowed and ordered filed as part of the record in said cause.

Spalding, MacDougald & Sibley, Attorneys for Plaintiff.

[fol. 29] Count II

Now comes the plaintiff and amends Count 2 of his petition, after leave of the Court first obtained, and for grounds of amendment says:

(1)

Plaintiff amends paragraph 2 of Count 2 by adding thereto the following allegation at the conclusion of said paragraph, to-wit:

That said A. B. Steele died on December 17th, 1916.

(2)

Plaintiff amends paragraph 16 of Count 2 by adding thereto the following allegation:

Said deed is hereto attached, marked Exhibit C, and is made a part of this petition.

Wherefore, plaintiff prays that this his amendment be allowed and ordered filed as part of the record in said cause.

Spalding, MacDougald & Sibley, Attorneys for Plaintiff.

The foregoing amendment be, and is hereby, allowed and is ordered filed as part of the record in said cause, subject to demurrer.

This the 25 day of April, 1925.

Sam'l H. Sibley, United States Judge.

[fol. 30] Exhibit C to Amendment to Petition

(1)

This indenture, made in duplicate this the 15th day of October, A. D. 1915, by and between J. H. Drummond and wife, Grace E. Drummond, of the Town of St. Andrews, Bay County, Florida, parties of the first part, and the St. Andrews Bay Railway and Terminal Company, a corporation under the laws of Florida, party of the second part, witnesseth, that,

In consideration of one dollar and other good and valuable considerations to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the said parties of the first part have bargained and sold, and by these presents do hereby

bargain, sell, grant, convey, transfer and assign, unto the said party of the second part, its successors and assigns, upon the terms and conditions hereinafter mentioned, all of the right, title interest, powers, privileges, right of way and use of the places, streets and public ways granted or conveyed to the said J. H. Drummond of the first part by that certain ordinance No. 30 passed by the Town Council of the Town of St. Andrews, a municipal corporation, in said County of Bay, and approved by the Mayor thereof on the 12th day of December, A. D. 1914, all in accordance with, limited by and conformable to all the terms, provisions, conditions and obligations in said ordinance set forth and mentioned, and also a strip of land (30) thirty feet in width, being (15) Fifteen feet on either side of the center line of the main line of railroad built by said J. H. Drummond, under the contracts hereinafter mentioned and as surveyed by E. L. Wood, Civil Engineer, as the definite location of the railroad now known as the St. Andrews
fol. 31] Bay Railway and Terminal Company railroad which road is now being operated under authority of the party of the second part and which strip of land (30) thirty feet in width above mentioned lies over and across the South end of the South half of Block numbered (41) Forty One in the South West Quarter of Section (6) Six in Township (4) Four South, of Range (14) Fourteen West and across Block (1) and the North East corner of lot (1) in Block (8) Eight in the North East Quarter of S. E. ¼ Sec. (1) in Township (4) four South, of Range (15) Fifteen West, and across lots and parts of lots numbered (6) Six, (7) Seven, (8) Eight, (9) Nine, (12) Twelve, (13) Thirteen and (14) fourteen in Block numbered (31) Thirty One, and across Lots (4) and (5) Five in Block numbered (30) Thirty; and also the following described land to-wit: All of the South half of lot (15) Fifteen in Block (30) Thirty and South Half of lots (4) Four and (5) Fifteen in Block (29) Twenty Nine and the South half of lots (4) Four and (15) Fifteen in Block (28) Twenty Eight and the South Half of lots numbered (14) Four- and (15) Fifteen in Block numbered (27) Twenty Seven and the South Half of lots numbered (4) Four and (5) Fifteen in Block numbered (26) Twenty Six and also that part of lot (4) Four in Block (25) Twenty Five bounded by a line commencing at a point (33) thirty three

feet north of the south east corner of said lot on the East Boundary line thereof and running South along the boundary line to the South East corner thereof, and thence in a direction North of West in a Straight line to a point on the West Boundary line (16½) Sixteen and one half feet north of the South West corner of said lot, thence North along the West boundary line of said Lot (4) four to the North west corner thereof, and thence in a direction South of East in a straight line to point of beginning and that part of Lot (15) Fifteen in Block (25) Twenty [fol. 32] Five bounded by a straight line commencing at the North East corner of said lot and running along the east boundary line thereof to a point (16½) sixteen and one half feet North of the South East corner of said lot, thence in a direction North of West in a straight line to a point (33) Thirty Three Three feet North of the South West Corner of said lot (15) Fifteen and thence North along the West Boundary line of said lot to the North West corner thereof and thence East along the North boundary line of said lot to point of beginning at the North East corner of said lot, and also that three cornered piece of land in Lot (16) Sixteen in said Block (25) Twenty Five bounded by a line beginning at the South East corner thereof and running West along the South boundary thereof to the South West Corner of said lot, and thence North along the West boundary line of said lot (33) Thirty Three feet and thence in a direction South of East in a straight line to point of beginning at the South East corner of said lot (16) Sixteen in said Block (25) twenty-five.

All lands described in Blocks Thirty One (31), (30) Thirty, (29) Twenty Nine, (28) Twenty Eight, (27) Twenty Seven, (26) Twenty Six, and (25) Twenty Five last above mentioned being in the North East Quarter of Section (1) One in Township (4) Four South, of Range (15) Fifteen West, according to plat thereof on file in the office of Clerk of Circuit Court in and for said County of Bay, and also lots (2), Two, (3) Three and a strip of land (17) Seventeen feet in width taken from the North side of lots (4) Four and (15) Fifteen, and also lots (16) Sixteen and (17) Seventeen in Block (31) Thirty One all in North West Quarter of Section (1) One in Township (4)

Four South, of Range (15) Fifteen West expecting a strip of land (8) eight feet in width taken from the east end of said lots numbered (2) Two, (3) Three and (4) Four in said Block (31) Thirty One for the purpose of widening [fol. 33] Beck Street. Also the South Half of Lots numbered (2) Two and (17) Seventeen and all of lots numbered (3) Three and (16) Sixteen and a strip of land (17) Seventeen Feet in width taken from the North side of Lots numbered (4) Four and (15) Fifteen in Block Numbered (32) Thirty Two excepting that strip of land (8) Eight feet in width taken from the East end of that part of lot (4) Four above mentioned to widen Chestnut Street, and excepting that strip of land (8) feet in width taken from the West end of that part of lot (15) Fifteen above mentioned and (8) Eight feet taken from the West end of lot (16) Sixteen and from West End of South Half of lot (17) Seventeen in Block (32) Thirty Two. Blocks Thirty One and Thirty Two last above mentioned being in the North West Quarter of Section (1) One in Township (4) Four South of Range (15) Fifteen West, excepting that of land described herein there is reserved eight feet on the West side of Clay Street and eight feet taken from land lying East of and eight feet from land lying West of Calhoun Street, Arthur Street, Foster Street, Hickory Street, Drake Street, Wilmot Street and Chestnut Street to widen said streets from Fifty to Sixty six feet and to be opened up to such width when so ordered by the Town Council of said Town of St. Andrews; also that piece or parcel of land bounded on the North by a line beginning at a point on the South boundary line of Auburn Avenue at the intersection of said line with the West boundary line of Bay View Street and running South (79) Seventy Nine Degrees West to the channel in the deep waters of St. Andrews Bay, and bounded on the East by the West boundary line of Bay View Street and on the South by a line beginning at a point on the West line of said Bay View Street (400) Four Hundred Feet South of point of beginning and running South (83) Eighty Three Degrees West to the channel in [fol. 34] the deep waters of St. Andrews Bay, and bounded on the West by the deep waters of St. Andrews Bay, said tract of land last above described being immediately west of Bay View Street and west of Block numbered (31)

Thirty One and situated in the North West Quarter of Section (1) in Township (4) Four South, of Range (15) Fifteen West in Bay County, Florida, together with all ripari-n rights within the boundary lines last above mentioned; also the railroad ties on the road bed of said railroad built by said J. H. Drummond excepting that at the railroad crossing where the main line of said Railroad crosses Washington Avenue said crossing shall remain the property of said J. H. Drummond and his assigns and the privilege of crossing same with cars or railroad equipment making reasonable use of same is hereby reserved to said Drumond and his assigns and the right of the party of the second part to use same for all regular and excursion trains is hereby granted upon the terms and conditions hereinafter mentioned. It is understood by and between the parties hereto that in compliance with agreements entered into by the said J. H. Drummond and A. B. Steele on June 6th, 1914, and July 9, 1914, that the said parties have secured the right of way for said road as agreed upon therein and that said J. H. Drummond has cleared, graded, laid the ties and surfaced the entire line of railroad above mentioned and that said A. B. Steele mentioned in said contract has furnished the rail, spikes, and bolts, plates, switches and all iron and steel material therefor excepting the crossing above mentioned. It is also understood that the said J. H. Drummond has built all trestles and culverts etc. and has built at and near the St. Andrews Ice & Power Co., Plant in said Town of St. Andrews at his own expense a "Y" which is to remain his property but he hereby agrees to allow said party of the sec-
[fol. 35] ond part, its successors and assigns, to use the same under this agreement for three years and to the said parties of the first part hereby agree to lease to said party of the second part, its successors and assigns, said "Y" for a period of three years from date thereof at the annual rental of one dollar per year with the provision that in the event any other line of railway shall be built into St. Andrews such other road, or roads, may under arrangement with said J. H. Drummond, his heirs or assigns, make reasonable use of said "Y" provided, however, that the St. Andrews Ice & Power Company and its assigns shall have and is granted the privileges of using said "Y" when

it can be done safely without unreasonably interfering with the operations of the road, and the parties using said "Y" shall share the expense of the cost of maintenance thereof in proportion to their use of same. The lease of said "Y" is likewise subject to the terms and conditions hereinafter mentioned. The acceptance of this conveyance, lease and agreement by the party of the second part, or the recording of same shall be conclusive evidence that said J. H. Drummond, party of the first part, has fully carried out and performed his agreement hereinabove mentioned with said A. B. Steele and has done so as modified, or changed by subsequent agreements, either verbal, or written relating to said contracts, and that said agreements have been fully and completely carried out and performed by him in a manner satisfactory to the party of the second part, including the construction of depot and all other matters, therein and thereby agreed to be done or performed by him; the party of the second part being the corporation organized by said A. B. Steele as provided by said contracts.

To have and to hold unto the said party of the second part, its successors and assigns, in fee simple, subject, how- [fol. 36] ever, to the following conditions, the non performance of which shall immediately and without notice, and without any action on the part of either of the parties of the first part, or their heirs or assigns, render this entire conveyance, assignment and lease void and from thenceforth of no effect whatsoever, and a full and complete title to all of the property and right and privileges hereby conveyed shall immediately revest in the said J. H. Drummond, party of the first part, his heirs and assigns, free from any claim on the part of the party of the second part, its successors and assigns, to-wit:

First: The said party of the second part, its successors and assigns, shall acquire the title to the aforesaid railroad which is now being operated by the said Company and from and after the date hereof shall maintain and operate same by steam or electricity along and over its right of way and track laid thereon designated in said ordinance and extending from the point in St. Andrews Bay from the Western End of said Railroad along the line of the right of way mentioned in said ordinance to and connect with the rail-

road now running into Panama City, Florida, in said county known as the Atlanta & St. Andrews Bay Railroad, owned and operated by the Atlanta & St. Andrews Bay Railway Company and from henceforth the said party of the second part, its successors and assigns, shall maintain and operate same and shall make such arrangements with the said Atlanta & St. Andrews Bay Railway Company as that said Atlanta & St. Andrews Bay Railway Company, or the said party of the second part, its successors and assigns, shall regularly operate regular passenger and freight trains from the Town of Dothan, Alabama, over the Atlanta & St. Andrews Railroad, and the railroad above mentioned to be [fol. 37] acquired by the said St. Andrews Bay Railway & Terminal Company constructed from the point above designated on said Atlanta & St. Andrews Bay Railroad to the point in the water of St. Andrews Bay designated in said ordinance, and shall constantly and continually, forever, from and after the date hereof, give to the Town of St. Andrews at all times service at least equal in all respects to that given to the Atlanta & St. Andrews Bay Railroad above mentioned or the owners or operators of the said Atlanta & St. Andrews Bay Railroad to the Town of Panama City, Florida, with rates for freight and passenger traffic equally as good (as far as permitted by the public authorities), and these provisions for service and rates shall apply to all freight and passenger trains, including excursion trains, provided that in case of failure to give such service, caused by strike, violence or unavoidable outside agency, a period of not exceeding thirty days to resume such service after such cause shall have caused to exist, shall be allowed.

Second. The party of the second part, its successors and assigns, shall pay all taxes and assessments levied or assessed against said property above described and every part of said property by any public authority, State, National or Municipal; such payment to be made not later than one year from the date that any such tax shall become due or payable.

In witness whereof, the said party of the first part has hereunto set their hands and seals the day and year above first written.

(Signed) J. H. Drummond (Seal), Grace E. Drummond (Seal).

[fol. 38] Signed, sealed and delivered in the presence of D. H. Andrews, F. Bullock.

Copy. Exhibit "C."

STATE OF FLORIDA,
Bay County:

This day, before the undersigned, personally appeared J. H. Drummond and Grace E. Drummond, his wife of Bay County, Florida, to me well known to be the identical persons described in and who executed the foregoing instrument, and acknowledged that they executed the same freely and voluntarily for the uses and purposes herein expressed, and the said Grace E. Drummond, wife of the said J. H. Drummond, did upon a separate examination by me held, separate and apart from her said husband, acknowledge and declare that she executed the same freely and voluntarily, and without fear or apprehension, compulsion or constraint of or from her said husband, and for the purpore of relinquishing, renouncing and conveying all her rights of whatever kind, in and to the said property.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the Town of St. Andrews in Bay County, State of Florida, this the 15th day of October, A. D. 1915.

(Signed) F. Bullock, Notary Public, State of Florida.
My commission expires June 10, 1919.

[fol. 39] IN UNITED STATES DISTRICT COURT

GENERAL DEMURRER—Filed October 6, 1924

Count One

Now comes the defendant, Ben W. Steele, executor of the estate of A. B. Steele, and demurs generally to Count One of the petition filed in this case, and says that said petition sets forth no cause of action against this defendant, and the allegations therein do not warrant or authorize the recovery in favor of the plaintiff against the defendant.

Count Two

Now comes the defendant, Ben W. Steele, executor of the estate of A. B. Steele, and demurs generally to Count Two of the petition filed in this case, and says that said petition sets forth no cause of action against this defendant, and the allegations therein do not warrant or authorize the recovery in favor of the plaintiff against the defendant.

Wherefore, defendant prays that this, its general demurrer be sustained and said petition dismissed.

Candler, Thompson & Hirsch, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER AND DISMISSING CASE—Filed April 25, 1925

This case coming on for hearing on general demurrer, after argument thereon, it is considered, ordered and ad-[fol. 40] judged that said demurrer be sustained and said cause is hereby dismissed with costs on plaintiff.

This April 25th, 1915.

Sam'l H. Sibley, U. S. Judge.

In United States District Court

No. 732, Common Law

J. H. Drummond, Plaintiff,

vs.

Ben W. Steele, Executor of the Etate of A. B. Steele, Deceased, Defendant

Petition for Writ of Error and Order Allowing Same—Filed May 9, 1925

To the Honorable Samuel H. Sibley, judge of said court:

Now comes J. H. Drummond, plaintiff, by his attorneys of record, Messrs. King, Spalding, MacDougald & Sibley, and respectfully shows to the Court as follows:

That on the 25th day of April, 1925, the Court passed in said cause the following order, to-wit:

"This case coming on for hearing on general demurrer, after argument thereon, it is considered, ordered and adjudged that said demurrer be sustained and said cause is hereby dismissed with the cost on plaintiff."

Said judgment—same being a final judgment, was entered on the 25th day of April, 1925, against your petitioner.

[fol. 41] Your petitioner feeling himself aggrieved by said judgment aforesaid, hereby petitions the Court for an order allowing him to prosecute a writ of error in the Circuit Court of Appeals, for the Fifth Circuit, under the laws of the United States in such cases made and provided.

Your petitioner has filed an assignment of errors in the office of the Clerk of this Court before the presentation of this petition.

Wherefore, the premises considered, your petitioner prays that a writ of error be issued in his behalf out of the United States Circuit Court of Appeals, for the Fifth Circuit, sitting at New Orleans, Louisiana, for the correction of errors so complained of and herewith assigned be allowed and that an order be made fixing the amount of security to be given by the plaintiff in error as the law

directs; that upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals of the United States, and that a transcript of the record and proceedings and papers, duly authenticated, may be sent to the Circuit Court of Appeals of the United States.

King, Spalding, MacDougald & Sibley, Attorneys for Petitioner, J. H. Drummond.

Upon consideration hereof, the Court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $250.00, which will operate as a supersedeas bond.

This the 9 day of May, 1925.

Samuel H. Sibley, United States Judge.

[fol. 42] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 9, 1925

To the Honorable Samuel H. Sibley, judge of said court:

J. H. Drummond, the plaintiff in this action, by his attorneys, Messrs. King, Spalding, MacDougald & Sibley, in connection with and as a part of his petition for a writ of error filed herein, makes the following assignment of errors, which he avers were committed by the Court in the rendition of a judgment against the plaintiff appearing upon the record herein, that is to say:

(1)

That the Court erred in sustaining the general demurrer to plaintiff's petition.

(2)

That the Court erred in holding and deciding that the petition of plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

(3)

That the Court erred in holding and deciding that the covenant on the part of A. B. Steele in the contract sued upon, to-wit:

"To procure that the said proposed railway company to be organized as aforesaid in conjunction with the said [fol. 43 & 44] Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Alabama, to St. Andrews, Florida, giving to St. Andrews, Florida, the same service at all times as shall be given by said Atlanta & St. Andrews Bay Railway Company to Panama City, both regular and excursion trains with equally good rates (as far as permitted by the public authorities) for the carriage of both passengers and freight."

is invalid, unenforcible and not binding.

Wherefore plaintiff in error prays that the judgment of said Court may be reversed.

King, Spaulding, MacDougald & Sibley, Attorneys for J. H. Drummond, Plaintiff in Error.

Bond on wit of error for $250.00, approved and filed May 9, 1925, omitted in printing.

[fol. 45] In United States District Court

Præcipe for Transcript of Record—Filed May 9, 1925

J. H. Drummond, plaintiff in the above stated case, by his attorneys of record, Messrs. King, Spalding, MacDougald & Sibley, specifies the following parts of the record in said case as the parts thereof requisite for the hearing of said case in the United States Circuit Court of Appeals for the Fifth Circuit.

(1)

Original petition filed by the plaintiff.

(2)

Amendment to the original petition filed and allowed on April 25th, 1925.

(3)

Demurrer filed by the defendant.

[fol. 46] (4)

Order of Court dismissing petition and entering a final judgment against plaintiff filed on the 25th day of April, 1925.

(5)

Petition for writ of error filed on the 9th day of May, 1925.

(6)

Assignment of errors filed on the 9 day of May, 1925.

(7)

Bond and approval.

(8)

Allowance of writ of error filed on the 9 day of May, 1925.

(9)

Writ of error filed on the 9 day of May, 1925.

(10)

Citation.

(11)

Clerk's certificate.

[fol. 47] (12)

This præcipe.

King, Spaulding, McDougald & Sibley, Attorneys for J. H. Drummond, Plaintiff in Error.

Due and legal service acknowledged, copy received, all other and further service waived.

This the 9 day of May, 1925.

Candler, Thomson & Hirsch, Attorney for Defendant in Error.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

In United States District Court

Note re Writ of Error and Citation

Writ of error and citation omitted from the printed record, the originals thereof being on file in the office of the U. S. Circuit Court of Appeals.

[fol. 49] Minute entry of argument and submission October 8, 1925, omitted in printing.

[fol. 50] In the United States Circuit Court of Appeals, Fifth Circuit

No. 4566

J. H. Drummond, Plaintiff in Error,

versus

Ben W. Steele, as Executor of Estate of A. B. Steele, Deceased, Defendant in Error

Before Walker, Bryan and Foster, Circuit Judges

Opinion—Filed February 13, 1926

Bryan, Circuit Judge:

This is a writ of error to review a judgment dismissing plaintiff's petition on general demurrer. The facts al-

leged in the petition are substantially the same as those developed in the case of St. Andrews Bay Lumber Co. v. Drummond, 299 Fed. 238, and need not be restated. In that case the plaintiff in this case recovered as damages the value of a quantity of rails removed from a terminal or branch line of railroad track. The point insisted on there was that the title to the rails did not revert to plaintiff, [fol. 51] and one of the grounds for holding that such title did revert was that the rails became an accession to the land, because the railroad was not built for temporary but for permanent use. We further held that Steele, whose executor is now sought to be held liable, bound himself personally by his contract with Drummond to procure the continuous and permanent operation of the railroad. We are still of the same opinion. The exact language of Steele's obligation, as it appears in the written contract, is:

"The said A. B. Steele further agrees to procure that the said proposed railway company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Ala., to St. Andrews, Fla., giving to St. Andrews, Fla., the same service at all times, as shall be given by the said Atlanta & St. Andrews Bay Railway Company to Panama City for both regular and excursion trains, with equally good rates (as far as permitted by the public authorities) for the carriage of both passengers and freight."

A condition in the deed to the railroad company organized and owned by Steele was that it should "constantly and continually, forever, * * * give to the town of St. Andrews at all times service equal at least in all respects to that given * * * to the town of Panama City," etc.

The contention of defendant is that the expression "at all times" in Steele's contract was descriptive of the quality of service, and not of its duration; in support of which it is pointed out that the condition in the deed would be broken upon failure to operate the railroad "constantly and continually forever." We are of opinion that Steele's [fol. 52] obligation to procure railroad service for St. Andrews was intended to continue so long as such service was given to Panama City. If the expression "at all times"

did not relate to the duration of service, it was superfluous, because without the use of it the same kind of service, while it lasted, would have been required. Multiplication of words would not have made the obligation more binding. The deed was a more formal instrument than the contract, and naturally more care would be taken in expressing the conditions upon which a reversion of title would take place. It is a fair inference that Steele was thoroughly acquainted with the provisions of the deed to his corporation, and it is reasonably to be supposed that the terms expressed in the deed were put in to carry out the intention of the contract, rather than that new or different terms were being agreed upon.

It is suggested that the contract between Drummond and Steele was void because it was in contravention of public policy, in that it embodied the idea that the parties to it by their undertaking to procure the passing of ordinances granting rights-of-way agreed to influence legislation. We do not understand that an agreement to secure legislation for legitimate purposes, and in a legitimate manner, is against public policy, nor unless that agreement by its terms or by necessary implication requires performance of acts which are of a corrupt character, or which have a corrupting tendency. 6 R. C. L. 732.

One of the counts of the petition seeks to recover damages measured by the depreciation in the value of plaintiff's property. We think such damages are too remote, but that plaintiff is entitled to recover such damages as will make him whole upon his investment, which was made in reliance upon the contract sued on.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 53] In United States Circuit Court of Appeals

[Title omitted]

Judgment—February 13, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Ben W. Steele, as Executor of Estate of A. B. Steele, Deceased, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fols. 54-58] Petition for rehearing, covering 5 pages, filed March 1, 1926, omitted from this print. It was denied and nothing more by order March 5, 1926.

[fol. 59] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Motion for Rehearing—March 5, 1926

It is ordered by the Court that the petition for rehearing filed in this cause, be, and the same is hereby, denied.

[fol. 60] Clerk's certificate to foregoing paper omitted in printing.

[fol. 61] In Supreme Court of the United States

Order Allowing Certiorari—Filed June 1, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U. S.
FILED
APR 30 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, A. D. 1925

No. 1[redacted]3[redacted]60

BEN W. STEELE, Executor of Estate of A. B. Steele, deceased,

Petitioner.

vs.

J. H. DRUMMOND,

Respondent.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS—FIFTH CIRCUIT

PETITION FOR CERTIORARI OF BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED

Wm. D. THOMSON
HAROLD HIRSCH,

Solicitors and of Counsel
for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925

BEN W. STEELE, Executor of Estate of A. B. Steele, deceased, PETITIONER, Vs. J. H. DRUMMOND, RESPONDENT.	Petition for Certiorari to the Circuit Court of Appeals, for the Fifth Circuit.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of BEN W. STEELE, as executor of A. B. Steele, deceased, respectfully shows to the Court as follows:

STATEMENT OF CASE.

J. H. Drummond, a resident and citizen of the State of Florida, brought suit in the District Court of the United States for the Northern District of Georgia, against petitioner, a resident and citizen of the State of Georgia, on an alleged breach of a contract entered into on July 9th, 1914, between the said J. H. Drummond and petitioner's testator.

At the time of making said contract, A. B. Steele was an officer and stockholder in The Atlanta and St. Andrews Bay Railroad Company, which owned and operated a railroad

from Dothan, Alabama, to Panama City, Florida, a small municipality fronting on St. Andrews Bay in Florida. J. H. Drummond at that time was a resident and property owner in an adjacent municipality known as the town of St. Andrews.

Drummond desired to have the railroad extended to his property. In order to do this it was necessary to build tracks along and over some of the public streets of the town of St. Andrews. Drummond communicated to Steele his "purpose in encouraging said enterprise to enhance his lands and other holdings in and around St. Andrews. . . . . and fully acquainted said Steele with the interest he held, the land he owned in said town and the benefits that would inure to him if the proposed extension was actually built." After some negotiations, Drummond agreed to furnish and grade the right of way and certain material, **"and to procure necessary franchises and ordinances from the town of St. Andrews."** Steele agreed to secure a charter for a railroad company and **"to procure that the said proposed railroad company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the two roads from Dothan, Alabama, to St. Andrews Bay, Florida, giving to St. Andrews Bay, Florida, the same service at all times as shall be given by said Atlanta & St. Andrews Bay Railway Company to Panama City."**

Steele obtained the charter for a railroad company, under the name of St. Andrews Bay Railway & Terminal Company. Drummond obtained the necessary franchises from the town of St. Andrews and complied with his agreement with

reference to building the railroad. Drummond then conveyed to the new railroad company, the railroad as built with the proviso in said deed that upon failure to operate it, it would revert to Drummond. The railroad company accepted the conveyance and operations were installed complying with the contract between Drummond and Steele. These operations continued until August, 1921, at which date service on the extension was abandoned. A. B. Steele had died in 1916, and petitioner had been duly appointed his executor. Upon the abandoning of said railroad, Drummond re-took possession of the railroad under the reversionary clause in his deed, and sometime later he brought this suit alleging that the contract of A. B. Steele required him to procure continuous operations of the railroad so long as the Atlanta & St. Andrews Bay Railroad was operated to Panama City, and that the discontinuance of service on the extension was a breach of Steele's individual contract. Drummond brought the suit in two counts, laying his damages in one count at $53,178.11 representing the alleged cost to him to comply with his part of the contract. (It does not appear whether any part of this was or was not used to procure favorable municipal action); and in the other count at $77,431.25 representing the alleged reduction in value of his property by reason of the discontinuance of the railroad.

ACTION OF TRIAL COURT.

Defendant filed a general demurrer to said petition, which was sustained by the Judge of the District Court, and both counts of the suit dismissed.

ACTION OF CIRCUIT COURT OF APPEALS.

Drummond appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which Court by a judgment rendered on the 13th day of February, 1926, sustained the action of the District Judge on the count seeking damages because of reduction in value of his property, saying that the damages were too remote.

The action of the District Judge in sustaining demurrer and dismissing the count seeking to recover the amount expended by Drummond in complying with his contract was reversed.

Petitioner shows that this action of the Circuit Court of Appeals in reversing the District Judge's ruling on the demurrer was a final judgment and was erroneous.

Motion for a re-hearing was filed by petitioner, which motion by order dated March 6, 1926, was denied and overruled.

CONTENTIONS OF PETITIONER.

While petitioner contended generally that the contract sued on had been completely fulfilled by Steele, when he procured a charter for the new railroad company and procured it to install service and to accept a deed to the right of way, he further contended **(and it is on this latter contention that we rely in applying for writ of certiorari)** that the contract was void and contrary to public policy and should not be enforced by a Court, for the following reasons:

First: Because the agreement of Drummond to procure the municipal franchises was an absolute agreement to get these franchises, regardless of the means which he might have to take to procure them. Should he fail in his efforts to procure the franchises from the municipal council it would have been a breach of his contract, for which he would have been liable in damages, and moreover the benefits which were to accrue to his property were contingent on his success in procuring the franchises. Such absolute agreement suggested in itself the use of sinister and corrupt means for the accomplishment of the end desired, if such means should become necessary.

A comparison of the view of the Circuit Court of Appeals as set out in its opinion in this case, with a view of the Supreme Court of the United States, makes clear our position:

The Circuit Court of Appeals in this case says:

> "We do not understand that an agreement to **secure** legislation for legitimate purposes and in a legitimate manner, is against public policy, **nor unless** that agreement by its terms or **by necessary implication requires** performance of acts which are of a corrupt character, or which have a corrupting tendency. 6 RCL 732."

The Supreme Court of the United States says:

> "**All agreements** for pecuniary considerations **to control** the business operations of the government, or the regular administration of justice, or the appointments to public offices, or **the ordinary course** of **legislation, are void,** as against public policy, **without reference to the question whether improper means are contemplated or used in their execution.**"

"Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired."

PROVIDENCE TOOL COMPANY vs. NORRIS, 2 WALLACE, page 45; 17 LAW ED. 868.

HAZELTON vs. SHECKELS, 202 U. S., page 71; 50 LAW ED. Page 939 (941).

* All black type ours.

In 6 RCL, on page 731, the exact language which we have quoted above from the Supreme Court of the United States is adopted as the correct rule governing validity of contracts to **control** legislation. We contend that the rule on page 732 cited by the Circuit Court of Appeals applies only in cases of contracts to **"influence"** legislation, with which contract the obligor has fully complied when he shall have used his **"influence"** in a legal manner, even though he may be unsuccessful in **"controlling"** or **"procuring"** the desired legislation, and in which therefore reward is not contingent upon success.

Second: The agreement of Steele was an absolute and unconditional agreement to "procure" service by two railroad companies, of which he was an officer, (one of which was in no way a party to the transaction between Steele and Drummond), regardless of whether this service was profitable to either or both of the companies. Such a contract put Steele in a position where to protect himself against individual liability, might require him to use his vote in either or both of said corporations, for a continuation of such service, regardless of the effect on the other stockholders.

Our contention is based upon what was said by the Supreme Court of the United States in a case where the President of a Corporation agreed to procure that his corporation would employ plaintiff as vice-president, this Court saying that a personal liability for damages "was calculated to be a strong incentive to the defendant to act contrary to the true interest of the company and of its stockholders .....It was the right of the other stockholders in the company, to have defendant's judgment as an officer of the company exercised with a sole regard to the interest of the company."

WEST VS. CAMDEN, 135 U. S. 504, 34 LAW ED. 254.

Your petitioner presents herewith as a part of this petition a certified transcript of the complete record of the Circuit Court of Appeals, marked Exhibit "A".

Petitioner contends that the issues involved in this case are of great general importance,

First: Because the Circuit Court of Appeals has misconstrued or failed to apply rules of public policy laid down in decisions of the Supreme Court of the United States directly applicable to the issues in this case.

Second: Because limitations on rights of parties to contract for the absolute control of the action of municipal or other public bodies or officials is vitally important to the public welfare in every town or hamlet in the United States, and to allow the decision of the Circuit Court of

Appeals to stand in this case, would tend to encourage laxity in public morals and promote efforts to control municipal action.

Third: Because Courts must compel officers and stockholders of corporations to comply with their duty to the other stockholders in said corporation, as a matter of great general importance throughout the entire United States; and to permit this decision of the Circuit Court of Appeals to stand is to encourage officers and stockholders of corporations to violate their obligations and lower the standard of morality of those in control of corporations, and thus do serious damage to the public welfare.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in this case, which was entitled in that Court, to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

BEN W. STEELE, as executor of the Estate of A. B. Steele, deceased,

By .....
His attorney.

STATE OF GEORGIA,
COUNTY OF FULTON.

W. D. THOMSON, being duly sworn, says that he is counsel for Ben W. Steele, as executor of Estate of A. B. Steele, deceased, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

.....

Sworn to and subscribed before me,

this the ..... day of April, 1926.

.....

NOTARY PUBLIC, COUNTY.
STATE OF GEORGIA.

Office Supreme Court, U. S.
FILED
MAR 3 1927
WM. R. STABBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 60

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER

vs.

J. H. DRUMMOND

BRIEF FOR THE PETITIONER

W. D. THOMSON,
HAROLD HIRSCH,
Solicitors and of Counsel for Petitioner.

Post Office Address:
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Atlanta, Georgia.

BEN FRANKLIN PRESS, INC., ATLANTA

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 360

BEN W. STEELE, EXECUTOR OF ESTATE OF A. B. STEELE, DECEASED, PETITIONER

vs.

J. H. DRUMMOND

BRIEF FOR THE PETITIONER

For Decision of Circuit Court of Appeals, see **Drummond vs. Steele, 11 Federal Reporter, Second Series, page 595.**

J. H. Drummond brought a suit at law, in two counts, in the District Court for the Northern District of Georgia, against Ben W. Steele, as executor of A. B. Steele, deceased, setting out a contract made between the said A. B. Steele and Drummond in 1914, and alleging a breach thereof by the defendant in 1921. A general demurrer was sustained by the District Court and the case dismissed. (R. 30) On appeal to the Circuit Court of Appeals for the Fifth Circuit the action of the District Court was on Feb. 13, 1926, reversed as to one count in the declaration. (R. 37). This Court granted a writ of certiorari (R. 38) and the case is now for review on the merits.

STATEMENT OF CASE

The case made by Drummond in the original declaration and the amendment thereto, was briefly as follows:

In 1914 Drummond was the owner of considerable property at St. Andrews Bay, Florida. The town had no Railroad facilities. Steele, directly and indirectly owned or controlled a large portion of the capital stock of a Railroad Company which had its terminus at Panama City, a small municipality adjoining St. Andrews. Drummond was desirous of having this Railroad extended to St. Andrews. His "purpose in encouraging said enterprise was to enhance his land," of which purpose he informed Steele. (R. 2.) After some preliminary negotiations a written contract was entered into, under which Drummond agreed to furnish a portion of the right-of-way and do certain construction work for the desired extension, and in as much as the extension must go along or across certain streets in the town of St. Andrews, he further agreed **"where said right of way passes over public streets of said town, to procure necessary franchises and ordinances from the town of St. Andrews."** (R. 17.)

Steele, on the other hand, agreed to secure a charter for the Railroad Company with $50,000.00 capital stock, to furnish the steel rails, etc., and **"to procure that the said proposed railroad company to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the two roads from Dothan, Alabama, to St. Andrews Bay, Florida, giving to St. Andrews Bay, Florida, the same service at all times as**

shall be given by said Atlanta & St. Andrews Bay Railway Company to Panama City." (R. 18.)

Drummond procured the necessary franchises and Steele the proposed charter, and the railroad was built according to the agreement. Steele procured the previously existing railroad company and the newly organized company to put into operation over the extension a joint through service into St. Andrews. Such service was continued until 1921, (Steele having died in 1916) when the service was discontinued, though the service to Panama City over the previously existing railroad continued. Drummond in his suit against the executor took the position that the obligation of Steele to procure service over the railroad was binding on him personally and on his executor so long as the previously existing railway continued its service to Panama City. He asks for judgment for $53,178.11 (the cost of the work) in one count and for $77,431.25 (the damage to value of his property) in the other.

ERROR ASSIGNED

Reversing judgment of District Court sustaining general demurrer.

ARGUMENT

FIRST: THE CONTRACT WAS ILLEGAL AND VOID IN ITS INCEPTION.

Because Drummond undertook thereby to "procure" at all events and regardless of the methods that might be necessary, the passage of certain ordinances by the Municipal Council of St. Andrews. The contract did not specify just what Drummond was to do in order to

thus procure these franchises, but it did bind him at all events to procure them, and had he failed to do so he would have breached the contract and been liable in damages, and would also have failed to obtain the enhancement to his property holdings, which was the consideration moving him to act.

Agreements to procure legislation are contrary to public policy and void.

PROVIDENCE TOOL COMPANY v. NORRIS 2 WALLACE, page 45; 17 LAW ED. 868.

HAZELTON vs. SHECKELS, 202 U. S. PAGE 71; 50 LAW ED. PAGE 939 (941).

CROCKER vs. U. S. 240 U. S. P. 74-82; 60 LAW ED. 535.

MEQUIRE vs. CORWINE, 101 U. S., 108; 20 LAW ED. 899.

The Circuit Court of Appeals in its opinion in this case says:

> "We do not understand that an agreement to secure legislation for legitimate purposes, and in a legitimate manner, is against public policy, nor unless that agreement by its terms or by necessary implication requires performance of acts which are of a corrupt character, or which have a corrupting tendency. 6 R. C. L. 732."

The Court failed to note the fact that in this case neither the exact services to be performed by Drummond nor the manner of their performance are specified so as to show affirmatively that they are legal. His agreement is not merely one to perform certain

legitimate services toward a given end but an absolute agreement to procure results and his compensation is contingent upon his success in procuring the franchise. This very contingency suggests the use of corrupt means, if necessary.

SECOND: THE CONTRACT WAS ILLEGAL AND VOID IN ITS INCEPTION.

Because the obligation assumed by Steele to "procure" at all events and regardless of the methods that might be necessary, action on the part of Public Service Corporations, of which he was a stockholder and officer, whether such action was for the benefit of their stockholders or was merely to protect Steele from an action for damages on his personal covenant, was contrary to public policy. In order to comply with his contract and save himself from personal liability he might be tempted to use his vote and official position to obtain corporate action of the railroad companies that was not to the best interest of their stockholders.

Agreement of officers and stockholders to procure corporate action are contrary to public policy and void.

WEST vs. CAMDEN, 135 U. S. 507; 34 L. ED. 254;

WARDELL vs. UNION R. CO., 103 U. S. 651; 26 L. ED. 509;

WOODSTOCK IRON COMPANY vs. RICHMOND, 129 U. S., 643 (662); 32 L. ED. 819 (826).

In the brief filed by Drummond in the Circuit Court of Appeals he stressed the fact that he knew that Steele had a controlling stock interest in the railway company and then concludes with these words: "He therefore knew that Steele was in a position to make good his personal covenant to procure for St. Andrews, Florida, service equal to the service given Panama City." In other words, it was his intention to take advantage of Steele's power to dominate the railroad corporations. As we understand the law as laid down by this Court in the cases above cited, it is this very fact that makes Steele's obligation illegal, because it put Steele's personal interest at variance with his duty to the other stockholders and might have a tendency to cause him to use his vote and his position in a way that was contrary to the interests of the railroad company, but necessary to save himself from personal liability.

THIRD: IF THE CONTRACT WAS VALID, STEELE'S PERSONAL LIABILITY TERMINATED WHEN HE PROCURED THE INSTALLATION OF SERVICE BY THE TWO RAILROAD COMPANIES AND WHEN THE NEWLY CHARTERED RAILROAD COMPANY IN ITS CORPORATE CAPACITY ACCEPTED A DEED FROM DRUMMOND, WHICH DEED CONTAINED A PROVISION UNDER WHICH THE ENTIRE PROPERTY REVERTED TO DRUMMOND IF SERVICE WAS DISCONTINUED.

It appears that service was continued for several years after Steele's death, and in as much as the service contracted for was interstate, it could not

have been discontinued without the consent of the Federal Railway Commission.

A construction of this contract which would make it binding upon Steele's estate years after his death and thus prevent the distribution of his estate, would seem to be very unreasonable, and should not be adopted if it admits of a more reasonable construction. In Drummond's declaration he had alleged that during negotiations which culminated in the written contract, he had informed Steele that he was willing to build the railroad provided Steele would "give some assurance" that St. Andrews "would have permanent railroad accommodations etc.," equal to the service "that was then or might thereafter be given Panama City." (R. 3) These verbal agreements were only binding in so far as they were merged into the writing. The writing no where uses the word "permanent" referring to the duration of Steele's obligation. No where does the contract specifically say that Steele's liability is to continue indefinitely. It is not in express language made binding on his heirs or administrators. If such liability exists under the contract it arises by implication only. Steele's agreement to "procure" corporate action was of a strictly personal nature which could not be performed as well by others. It depended on his continued ownership, of the controlling stock and his personal dominating influence over the corporations. The fact that this railroad company would forfeit to Drummond all of its property, including not only that which was furnished by Drummond, but also steel rails, etc., furnished out of the corporate funds, and that it would be under the control of the railroad commission and could not cease rendering the service without the

consent of the commission, would seem to have furnished reasonable security to Drummond that the contract would be carried out by the railroad company without any further collateral guarantee by Steele or his estate. It is not to be supposed that Steele's estate intended to retain control of both railroads permanently, nor that Drummond intended to hold his property perpetually. He alleges in his declaration that he had pointed out to Steele "the benefits that would enure to him if said proposed extension was **actually built.**" (R. 2) Actual construction was his primary purpose. A prospective purchaser from Drummond seeing the railroad in actual operation would not be deterred in buying Drummond's property because of the remote possibility that at some future date the railroad might secure the consent of the railroad commission to discontinue service and forfeit all of its property as a result thereof.

Moreover, the obligation of Steele and the obligation of Drummond are couched in the same language. Each was to **"procure"** certain things to be done. It would seem that this word procure should be construed in the same way as to both of the obligors. Drummond assumes that when the Municipal Council voted to grant the franchises he had completely complied with his obligation to procure them, nor does he recognize a continuing liability on his part which would render him liable for damages if at some subsequent date the Municipal Council should revoke the franchises. Applying the same rule of construction to Steele's obligation, he had completely complied therewith when he chartered and capitalized a new railroad company and procured the installation of the type of service called for. Thereafter the contract

with Steele was functus officio and was superseded by the direct contract between Drummond and the newly chartered Railway Company set out in the deed to the right of way, water front, etc. This latter contract contained much more detailed stipulation as to the service to be given and the reversion of the property to Drummond if the service ceased. It was expressly made binding on the successors and assigns of the Railroad Company.

The primary rule for construing contracts **is, of course, to find the intention of the** parties. If **one construction would make a contract** improbable and **unreasonable, that construction should not be adopted** —provided **there is a more probable and** reasonable construction.

BELL vs. BRUEN, 1 HOWARD, 169; 11 L. ED. 89;

BARNDALL vs. LEAHY, 195 FED. REP. 731;

PRESSED STEEL vs. EASTERN RY., 121 FED. 609 (611); 57 CCA. 65;

AMER. BONDING CO. vs. PUEBLO, 150 FED. 17 (28); 140 FED. 701.

The Circuit Court of Appeals in this case followed a previous decision in which they had considered the same contract. **St. Andrews Bay Lumber Company vs. Drummond, 299 Federal Reporter, page 240.** With reference to that case it is sufficient to say that neither Steele nor his executor was a party thereto. The only question in that case was as to whether or not Drummond had a right to take the rails when the right of way reverted to him by virtue of the

discontinuance of service. We think the Court rightly decided that he did have a right to the rails. In order to reach that decision it was not at all necessary to in any way pass upon the alleged collateral obligation of Steele or his executor as to procuring continuation of service. The legality of the contract in that case was apparently admitted by both sides.

We respectfully submit that the District Court was right in sustaining the general demurrer and that the action of the Circuit Court of Appeals in reversing this case should be set aside.

Respectfully submitted,

W. D. THOMSON,
HAROLD HIRSCH,
Solicitors and of Counsel
for Petitioner.

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Office Supreme Court, U. S.
FILED
APR 25 1927
WM. R. STANSBURY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1926

No. [redacted] 60

BEN W. STEELE, Executor of Estate of A. B. Steele, deceased, Petitioner.

v.

J. H. DRUMMOND, Respondent.

BRIEF FOR RESPONDENT

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Supreme Court of the United States

OCTOBER TERM, 1926

No. 360.

BEN W. STEELE, Executor of Estate of A. B. Steele, deceased, Petitioner.

v.

J. H. DRUMMOND, Respondent.

I.

THE MEANING OF THE CONTRACT—THE INTENTION OF THE PARTIES

Steele's covenant declared on in this cause is in the following language:

> "The said A. B. Steele further agrees to procure that the said proposed railway company, to be organized as aforesaid in conjunction with the said Atlanta & St. Andrews Bay Railway Company shall operate regular trains over the said two roads from Dothan, Ala., to St. Andrews, Fla., giving to St. Andrews, Fla., the same service at all times as shall be given by the said Atlanta & St. Andrews Bay Railway Company to Panama City for both regular and excursion trains, with equally good rates (as far as permitted by the Public Authorities) for the carriage of both passengers and freight." (R. 18.)

Clearly Steele's covenant related to something that should be done by the proposed Railway Company. He agrees "to procure" that company to give a certain quality of service for a certain period of time. The standard of and the duration of the service that he contracted "to procure" was measured by the standard and the duration of the service that the Atlanta & St. Andrews Bay Rwy. Company rendered to Panama City.

Taking this language at its face value, would require that Steele should procure for St. Andrews, Fla., the same service at all times as the Atlanta & St. Andrews Bay Rwy. Company rendered Panama City.

That the parties meant what they said is emphasized by Drummond's contributions to the enterprise which may be summarized as follows:

(a) Obtained and conveyed to said company a right of way within the City of St. Andrews, Florida;

(b) Paid all cost and damage in obtaining possession of said right of way passing over privately owned lands, and to procure necessary franchises and ordinances from the town of St. Andrews, Florida;

(c) If any land could not be obtained by agreement, the same was to be condemned by the proposed Railroad Company, said Drummond agreeing to stand the expense thereof;

(d) Bore the expense of clearing and grading the whole of said land from Atlanta & St. Andrews Bay Railway to the waters of said St. Andrews Bay, approximately a distance of 3 miles;

(e) Furnished all ties and lay the same and built all necessary trestles and culverts;

(f) Built "Y" of about 3-4 of a mile;

(g) Conveyed, or caused to be conveyed, to the proposed railroad company water terminals fronting 400 feet on St. Andrews Bay and running back about 50 feet to a street.

Drummond performed his obligation at the cost of something over $53,000. The railroad was capitalized at $50,000, and all, or practically all, of the stock was taken by Steele, none by Drummond.

Drummond, in substance, said to Steele:

I am willing to furnish the capital to build the railroad and condition the operation upon the continued operation of service to Panama City.

Steele, in substance, said to Drummond:

I will accept your expenditure of capital and if service is continued to Panama City and discontinued to St. Andrews, Fla., I will return to you the capital that you have invested. Such an agreement on the part of the parties was reasonable under the circumstances.

On the other hand, it would have been unfair and inequitable for Steele to have required Drummond to furnish the capital, given him no ownership in the corporation, and upon failure of service to have left Drummond out of pocket.

Certainly, if Drummond had not placed substantial reliance upon Steele's covenant, an entirely different contract would have been made. Except for this covenant Steele would have offered and Drummond would have required a division of the corporate stock. Such a contract would have equalized the prospects of remuneration.

II.

STEELE'S COVENANT NOT TEMPORARY

The contention is made that the covenant of Steele was temporary and ceased when the corporation was organized. This contention is in the nature of a paradox. The covenant itself, by its express language, deals with a situation that came into existence after the organization of the corporation. To say, that as soon as the condition arose upon which the obligation operated that the obligation itself became extinct, is to bring about an absurd situation.

So, the further contention that the reversionary provision of the deed satisfies all claims in the event of a breach of the covenant would seem unsound.

As to this contention the Circuit Court of Appeals, 11 Fed. Rep. (2nd Series) page 596, said:

> "It is a fair inference that Steele was thoroughly acquainted with the provisions of the deed to his corporation, and it is reasonably to be supposed that the terms expressed in the deed were put in to carry out the intention of the contract, rather than that new or different terms were being agreed upon."

The reversionary provision of the deed, as pointed out by the Circuit Court of Appeals, did not supersede the personal obligation of Steele on his covenant. That provision of the deed in reality merely measured the extent of the corporation's title. The only title that the Railroad Corporation had need of was the use of the land during the continuation of railroad operations—such title only as it could obtain under condemnation proceedings, and that title through condemnation was contemplated, is clear from that provision of the contract as follows:

"And the said A. B. Steele shall cause the said Railway Company when incorporated to condemn any part or parts of such right of way which cannot be procured by private agreement at reasonable cost; the cost of such condemnation within the limits of St. Andrews to be borne by the said J. H. Drummond, including the values of the land so condemned." (R. 17.)

III.

THE CONTRACT IS NOT IN VIOLATION OF PUBLIC POLICY

This contract does not injure the public service. It is in promotion of service to the public; nor does it give to Drummond any advantage over any other member of the public; nor is it an agreement by one person to accept employment of another to influence or procure legislation.

In essence the contract is one in which Drummond furnishes the capital to an enterprise. Steele becomes the owner of the capital so contributed by Drummond. Steele agrees that the capital shall be employed to give a certain quality of service, and failing to give the service, he agrees to indemnify Drummond.

In criticizing that portion of the opinion of the Circuit Court of Appeals, which denies the defendant's contention that the contract is invalid, counsel in their brief, page 6, say:

"The Court failed to note the fact that in this case neither the exact service to be performed by Drummond nor the manner of their performance by Drummond are specified so as to show affirmatively that they are legal. His agreement is not merely one to per-

> form certain legitimate services toward a given end but an absolute agreement to procure results and his compensation is contingent upon his success in procuring the franchise. This very contingency suggests the use of corrupt means, if necessary."

The underlying assumption upon which counsel proceed is that Steele hired Drummond to influence legislation, promising to pay him if his services were successful. No basis for this assumption can be found in the language or purpose of the contract. The contract did not give birth to the relationship of employer and employee. Drummond merely agreed to contribute capital in and to an enterprise in which Steele was primarily interested. Incident to the enterprise a license or franchise to use the public streets necessarily had to be granted by proper corporate authority of the municipality.

The opening paragraph of the contract of June 6th, contains this provision:

> "The said parties desire to enter into the agreement hereinafter set forth for the construction and maintenance of a line of railway from the Atlanta & St. Andrews Bay Railway in Panama City to the town of St. Andrews, the right of way for which is to be provided for by the said parties, the said A. B. Steele (within ten days shall take steps to procure) at his own expense for the said proposed railway, a right of way over that part of its line, lying within Panama City, and the said J. H. Drummond shall within said time take steps, at his own expense, to secure the right of way for said proposed road lying within St. Andrews, Fla., and if at the expiration of said time they are mutually satisfied of their ability to procure said right of way and to carry out the said proposed agree-

ment, they shall then enter into a contract therefor as hereinafter provided." (R. 16.)

As a condition precedent to the binding force of the contract, the parties were given opportunity to ascertain whether the provisions could be carried out, one of the provisions being the obtaining of such franchise.

The power to declare a commercial contract invalid because it violates public policy should be sparingly exercised by Courts. The rule by a Court of respectable authority is thus announced:

> "But further than this, the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.
>
> "In Richardson v. Mellish, 2 Bing, 229, Sir James Burrough is quoted as saying: 'I . . . . protest, as my lord has done, against arguing too strongly upon public policy. It is a very unruly horse, and when once you get astride it, you never know where it will carry you. It is never argued at all but when other points fail'."

The Courts will presume that the contract is valid and that no illegal means are contemplated unless there is something in the contract that carries a different conclusion. The only exception is in those contracts where the general scheme is of a corrupt nature.

There is a sound public policy in permitting a citizen freedom of contract. There is a sound public policy in presuming that the citizen is honest until the contrary is made

to appear by substantial evidence, either within the contract itself, or within the scheme embraced in the contract.

The assumption of false virtue is as harmful as the lack of virtue. Both are unrighteous.

This Court fully recognized in the case of Valdes v. Larrinaga, 233 U. S. 705, that all contracts between parties, the purpose of which is to obtain a concession from the Government or of a department thereof, are not invalid.

The contract there under attack provided that Larrinaga, formerly Assistant Secretary of the Department of Interior, should help in getting through a water franchise for the La Plata River for the purpose of developing electric power and should help in everything concerning the technical part of getting such franchise through, such as plans, project, etc. Larrinaga's compensation was represented by 10% of the profits in the enterprise.

It was insisted that the contract in that case was controlled by the case of Hazelton v. Sheckells, 202 U. S. 71, and similar cases.

In declaring the contract legal and enforceable, this Court on pages 709 and 710 said:

> "But we discover nothing in the language of the letters that necessarily imports, or even persuasively suggests any improper intent or dangerous tendency. * * * * In view of the subject matter, a grant, it would seem to a riparian owner, of the right to use water power for public service, the things done, such as joining in an application to the Military Government for a franchise on the footing of a joint interest, or helping to present it to the Secretary of War when it came up to him, or preparing plans and specifications to be

presented to the Executive Council of Porto Rico when the first franchise granted by the Secretary of War had been lost by not complying with its terms, have no sinister smack."

A well considered case, in which the authorities of this and other Courts are fully reviewed, is that of Noble v. Meade-Morrison Manufacturing Company, 129 N. E. 669.

The Supreme Court of Massachusetts on page 672 in that case enters into a very informative discussion of the entire question here involved.

The case at bar is fully sustained by the case of C. C. Cole v. Brown-Hurley Hardware Company (Iowa—117 N. W. 746) 18 L. R. A. (N. S.) 1161.

That is a well considered case by the Supreme Court of Iowa. See also Burbank v. Jefferson City Gaslight Co., 35 La. Ann. 444; Greene v. Nash, 85 Me. 148 (26 Atl. 1114).

The case at bar is distinguishable from the cases cited by opposing counsel. In Tool Company v. Norris, 2 Wall. 45, this Court had before it a contract originating during the Civil War; Norris agreed to obtain, and did obtain, for the Tool Company a contract for the manufacture of 25,000 muskets, the price of each musket was $20.00. He claimed as compensation for his services all received by the Tool Company in excess of $17.00 per musket. His total compensation amounted to $75,000, according to his claim.

In procuring the contract he used his personal influence with Senators and Government officials.

The question decided by this Court is stated on page 54 as follows:

> "The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies be enforced by the Courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of public funds."

Hazelton v. Sheckells, 202 U. S. 71. In that case Hazelton prayed for the specific performance of a contract for the purchase of a lot in Washington. His bill alleged that part of the consideration entering into the sale of the lot consisted in services rendered by him, both before and after making the contract, in bringing the property to the attention of Committees of Congress as a suitable and appropriate site for a Hall of Records. He further alleged that these services had been successfully performed.

In declaring the contract void this Court on page 78 said:

> "According to the bill, and no doubt according to the fact, a part of the consideration was services, as

we have quoted, and therefore it is not true, as argued, that the plaintiff could have demanded a conveyance on tendering the nine thousand dollars alone. But the services contemplated as a partial consideration of the promise to convey were services in procuring legislation upon a matter of public interest, in respect of which neither of the parties had any claim against the United States. An agreement upon such a consideration was held bad in Tool Co. v. Norris, 2 Wall. 45. Of course we are not speaking of the prosecution of a lawful claim.

"It will be noticed further that the conveyance was in substance a contingent fee. The plaintiff was not bound to accept it and naturally would not do so unless he could agree as he did with the Government for a larger price. The real inducement offered to him was that he would receive all that he could persuade the Government to pay above the sum named."

In the case of Meguire v. Corwine, 101 U. S. page 108, plaintiff claimed that he had obtained a public office for defendant; that the defendant agreed to pay him for such services one-half of defendant's compensation. The contract was declared illegal as constituting a sale of personal influence.

Since the rendition of the decision in the case of Tool Company v. Norris, supra, this Court has permitted contracts to stand, which under the broad language of the Norris case would have been struck down.

See Nutt v. Knut, 200 U. S. 12, 21 and 22; McGowan v. Parish, 237 U. S. 285.

IV.

THE CONTRACT WAS NOT ILLEGAL AND VOID FROM ITS INCEPTION, AS CONTENDED.

This is not a contract where an officer of a corporation agrees in consideration of a benefit to him to have the corporation, of which he is an officer, employ a third party; nor is it a contract in which one who occupies a fiduciary position, in consideration of a private benefit to himself, assumes an inconsistent position towards another; nor does it create a dual agency whereby an agent obtains secret profits at the expense of the principal.

In essence it is an agreement by one person to protect the capital investment of another, under certain contingencies. Such agreements frequently arise where one stockholder agrees to purchase the stock of another stockholder in the event the corporation fails to pay dividends, or in the event the corporation becomes insolvent. These agreements are universally upheld by courts.

In Morgan v. Stuthers, 131 U. S. 246, this Court upheld a contract against the contention that it was contrary to public policy, wherein it was provided that B & S in consideration of the subscription of stock by M would purchase M's stock should M desire to sell.

An agreement of the same nature was enforced in the case of Rogers et al v. Burr, Administratrix, 97 Ga. 10.

In Vinton v. Pratt, et al, 117 N. E., page 919, the Supreme Court of Massachusetts held that:

> "One who took stock in a gold mining company under agreement that the organizers should save him harmless on the investment, guaranteeing repayment of the money with interest at 6 per cent, the capital stock having become worthless, could have sued at law

for reimbursement of the amounts advanced by him, with interest."

In Cook on Corporations, 8 Ed. Vol. 2, pages 1227, 1228 and 1229 many cases are cited upholding such contracts.

None of the cases relied upon by the petitioner are applicable to the case at bar:

The facts in the case of West v. Camden, 135 U. S. 507 are clearly distinguishable from the facts in the case at bar. In that case West, the plaintiff, was originally a member of the partnership of C. W. West & Sons; that company sold its holdings to the Baltimore United Oil Company, a corporation, for $137,500, and West also subscribed for 457 shares of stock in that company. Out of the 6000 shares, which constituted the capital stock, 5509 were subscribed to by the defendant, Camden, as Trustee for the Standard Oil Company, who furnished the money and was the real owner. Camden occupied the position of President of the new company and West Vice-President until January 1883, when a change in management occurred and West was dropped as an officer. West knew that Camden was the agent of the Standard Oil Company in subscribing to the capital stock and in the organization of the new company.

Having lost his position, West sued Camden for $50,000.00, claiming that Camden, as part of the consideration for the original sale of the property from C. W. West & Sons to the new corporation, agreed to employ West as Vice-President of the company permanently.

The contract was declared void as contrary to public policy. The basis of the Court's decision will be found on page 520, as follows:

"The agreement alleged to have been made was one on the part of the defendant whereby he might be required to act contrary to the duty which, as an officer of the Baltimore United Oil Company, he owed to that company and to the stockholders other than the plaintiff. The same rule which is applicable to the case of a public office applied to the present case, although it does not appear that the defendant was to receive direct personal pecuniary compensation or gain for what he was to do. The plaintiff, on his own showing, dealt with the defendant in reference to the fiduciary relation which the latter bore to the stockholders, both of the Standard Oil Company and of the Baltimore United Oil Company. The agreement alleged was an agreement which bound the defendant as to his future action as a director of the Baltimore United Oil Company, and an agreement to keep the plaintiff permanently in the position of Vice-President of that company, irrespective of its interests. It amounted to a stipulation on the part of the defendant that no contingency should happen which should require a change of management and a reduction of expenses."

In that case, Camden as an officer of the Oil Company, stood in a fiduciary relation to the Company. As Trustee of the stock he also stood in a fiduciary relationship to that Company. Any contract he made where his individual interests were involved, that limited his freedom of action in the discharge of his duty as President of the Company and in the discharge of his duty as voting Trustee necessarily was immoral and corrupt in its tendency.

The law has ever denounced contracts between parties, the object or purpose of which would bring about or tend to bring about a breach of duty.

In Waddell v. Railroad Company, 103 U. S. page 658; the Directors of the Railroad Company, entered into a contract in which they were to receive private gain and in order to shield their actions a corporation was organized to carry out the contract and the Directors became stockholders. The contract was denounced by the Court, and properly so.

In Woodstock Iron Company v. Richmond and Danville Extension Company, 129 U. S. 643, an employee of a railroad company accepted a consideration from the Iron Company for locating a line of railroad at a point desired by the Iron Company. In denouncing the contract this Court held:

> "It was a contract by an employee of a railroad company with a third party, for a consideration to be received from that third party to violate its engagement with its employer in the important business of locating and constructing a railroad, and instead of selecting the shortest, cheapest and most suitable route, to locate the road by a longer route, and thus impose an unnecessary and heavy burden upon its employer—the proposition of the Iron Company, which was accepted, was to pay the extention company for a breach of its duty. In plain language, it was nothing less than the offer of a bribe to the latter company to be faithless to its engagements, and to do with reference to the business in which it was engaged what would amount to little less than robbery of its employer. The transaction of the Iron Company was none the less offensive, because of the threats of the Extension Company, made by its Vice-President, who was also a director and stockholder of the railroad company, that, if the land and money mentioned were not donated, it would cause the railroad to be located away from Anniston by the rival town of

Oxford. The threats did not excuse, much less justify the offer."

Men of full age and competent understanding should have the utmost liberty to contract, and contracts entered into freely and voluntarily should be held sacred and enforceable by the Courts.

Respectfully submitted,

DANIEL MacDOUGALD,

JOHN A. SIBLEY,

Solicitors for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 60.—October Term, 1927.

Ben W. Steele, Executor of Estate of A. B. Steele, Deceased, Petitioner, *vs.* J. H. Drummond. | On Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

[November 21, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

Respondent sued in the district court for the northern district of Georgia to recover damages for breach of contract. A general demurrer was interposed and sustained. The Circuit Court of Appeals held that one count states a cause of action and reversed the judgment. The petition for certiorari was based on the contention that the contract in suit was contrary to public policy and void. No other question will be considered. *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240, 242; *Webster Co.* v. *Splitdorf Co.*, 264 U. S. 463, 464.

The material allegations are: Panama City and St. Andrews are adjoining municipalities in Florida. These were rival cities whose resources were timber lands and fisheries awaiting development. A. B. Steele was a stockholder in the Atlanta and St. Andrews Bay Railway Company which operated a railroad between Dothan, Alabama, and Panama City. He was interested in a lumber company which was a large stockholder in the railway company. Drummond owned much land in St. Andrews, and some of it was on St. Andrews Bay. Steele desired to extend the railway from Panama City to the bay. Drummond was willing to cooperate with him to that end. His purpose was to enhance the value of his lands by procuring railroad facilities for St. Andrews equal to those at Panama City. Steele agreed to procure a charter for a railway company; to convey to it a right of way within Panama City; to furnish all the iron and steel for track material; to deliver the cross ties which were to be furnished by Drummond; and to procure the proposed company, in conjunction with the At-

lanta & St. Andrews Bay Railway Company, to operate regular trains over the two roads from Dothan to St. Andrews, giving the latter the same service as that had by Panama City. Drummond agreed to obtain and convey to the new company a right of way within St. Andrews, "and to procure necessary franchises and ordinances from the town of St. Andrews"; to pay the cost of clearing and grading the whole line, furnish and lay all ties, build necessary trestles and culverts, lay the rails, and put in a wye; and to cause a tract of terminal land fronting on St. Andrews Bay to be conveyed to the new company. Steele procured the charter; organized a company and became owner of all its stock. And, at his instance, Drummond conveyed the completed railroad to the new company. Steele caused the railway service to be furnished as agreed until August, 1921, when operation ceased. Service at Panama City continued. Except for the covenant in respect of service for St. Andrews, Drummond would not have made the contract. This was known to Steele. And it is alleged that to perform on his part, Drummond expended $53,178.11; and that, by reason of Steele's failure to cause continuous service, Drummond's expenditures became a total loss.

Petitioner contends that the contract is illegal and void because respondent's undertaking to procure the passage of the ordinances was contrary to public policy. In *Marshall* v. *Baltimore and Ohio Railroad Company*, 16 How. 314, Mr. Justice Grier, delivering the opinion of the Court, said (p. 334): "It is an undoubted principle of the common law, that it will not lend its aid to enforce a contract to do an act that is illegal; or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." And then, to make distinction between legitimate action and the contract condemned in that case, it is said: "All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in per-

son or by counsel professing to act for them, before legislative committees, as well as in courts of justice." While the principle is readily understood, its right application is often a matter of much delicacy. It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. *Baltimore & Ohio Southwestern Ry.* v. *Voigt*, 176 U. S. 498, 505. The meaning of the phrase "public policy" is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. 1 Story on Contracts, (5th ed.) § 675. *Pope Mfg. Company* v. *Gormully*, 144 U. S. 224, 233. It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. *Atlantic Coast Line R. R. Co.* v. *Beazley*, 54 Fla. 311, 387; *Barrett* v. *Carden*, 65 Vt. 431, 433; *Richmond* v. *Dubuque & Sioux City R. R. Co.*, 26 Ia. 191, 202; *Egerton* v. *Earl Brownlow*, 4 H. L. Cas. 1, 122; *Richardson* v. *Mellish*, 2 Bing. 229, 242, 252. Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated. *Valdes* v. *Larrinaga*, 233 U. S. 705, 709. The contract here under consideration is to be distinguished from those dealt with in *Tool Company* v. *Norris*, 2 Wall. 45; *Trist* v. *Child*, 21 Wall. 441; *Meguire* v. *Corwine*, 101 U. S. 108; *Oscanyan* v. *Arms Company*, 103 U. S. 261; *Hazelton* v. *Sheckells*, 202 U. S. 71, and *Crocker* v. *United States*, 240 U. S. 74. The claims there considered were under contracts requiring or contemplating the obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means.

But this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. He was interested as an owner of property. Neither the contract, nor what was done, suggests that the location or construction of the proposed line was not a legitimate enterprise undertaken for the public good, or that anything improper was contemplated as a means to secure the passage of the ordinances. Drummond's object was to obtain the railway service; and, for that purpose, he expended a large sum. The mere fact that he

owned property that might be favorably affected does not tend to discredit him or to make evil his undertaking to obtain the ordinances. His interest in having the railroad extended into St. Andrews gave him the right in every legitimate way to urge the passage of appropriate ordinances. There is nothing that tends to indicate that in the promotion or passage of them there was any departure from the best standards of duty to the public. The contention that Drummond's agreement to secure their passage was contrary to public policy cannot be sustained. *Cole* v. *Brown-Hurley Co.*, 139 Ia. 487; *Burbank* v. *Gas Company*, 35 La. Ann. 444; *Greene* v. *Nash*, 85 Me. 148. Cf. *Houlton* v. *Nichol*, 93 Wis. 393; *Noble* v. *Mead-Morrison Mfg. Co.*, 237 Mass. 5, 21.

Petitioner also contends that the contract contravened public policy and is void because Steele agreed to procure the specified service to be given St. Andrews. The argument is that, in order to keep his covenant, he might be tempted to use his vote to obtain corporate action of the railroad companies that was not to the best interest of their stockholders. But the contention has no foundation of fact on which to rest. As shown above, it must be clearly established that public policy would be violated before Steele may raise that objection to prevent enforcement of the contract. The allegations do not indicate that the carriers were not in duty bound to give equality of service to these adjoining and competing towns; and, for aught that appears, their interests would have been served best by continuing operation over the new line. It does not appear that the giving of the service would have resulted to the disadvantage of either company or its shareholders. Steele took all the stock of the new company; it does not appear that it ever had any other stockholders. The facts alleged fail to show that performance would tend to constitute a fraud upon the old company or its stockholders or tend in any degree to injure them. It would be mere speculation to say that the transaction described has any tendency to bring Steele's personal interest into conflict with his duty as a voting shareholder.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.